

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**F.P., Appellant**

**and**

**GENERAL SERVICES ADMINISTRATION,  
PUBLIC BUILDING SERVICE,  
Kansas City, MO, Employer**

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**Docket No. 17-0090  
Issued: April 6, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 21, 2016 appellant, through counsel, filed a timely appeal from an August 25, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish that his asbestosis is causally related to factors of his federal employment.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal counsel contends that OWCP disregarded the facts. He contends that OWCP was familiar with the etiology of asbestos disease, and that the decision amounted to feigned ignorance.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts of the case as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On September 12, 2013 appellant, then a 62-year-old retired air condition operator/mechanic, filed an occupational disease claim (Form CA-2) alleging that he had been exposed to asbestos for 20 years at work, that he had not been provided a mask or other protection, and that as a result he suffered from asbestosis.

In support of his claim, appellant submitted an April 1, 2013 radiology report wherein Dr. Brigid M. Poe, a Board-certified radiologist, related a finding of blunted left lateral costophrenic angle which she suspected was most likely a function of pleural thickening and two nodular densities in the left upper lobe. OWCP also received a computerized tomography (CT) scan dated April 5, 2013, which interpreted by Dr. Vjekoslav Jeras, a Board-certified radiologist, as revealing calcified pleural plaques along bilateral hemidiaphragms as well as lateral chest walls, consistent with prior asbestos exposure. Dr. Jeras also found subtle four millimeter hypodensity subcapsular location, left lobe of liver, too small to characterize, suggesting small hepatic cyst.

By decision dated November 19, 2013, OWCP denied appellant's claim, finding that he had failed to establish fact of injury. It found that the evidence of record did not support that the work conditions occurred as alleged, and the medical evidence of record did not provide a medical diagnosis causally related to the alleged factors of employment.

On November 21, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

OWCP thereafter received an October 29, 2013 report, wherein Dr. Gregory Hickey, an osteopathic physician, reviewed appellant's abdominal CT chest scan of April 2013 and noted that there were several areas of calcified pleural plaque, but no discrete nodules. Dr. Hickey listed appellant's diagnoses as chronic asbestosis, personal history of prostate cancer, and chronic rhinitis.

By decision dated March 21, 2014, an OWCP hearing representative noted that he conducted a preliminary review of the evidence and found that the case was not in posture for decision. He noted that OWCP should forward the claimant's factual statement to the employing establishment to request comments and an explanation with regard to appellant's asbestos exposure. OWCP was thereafter to make findings as to whether appellant had established that the alleged exposure occurred at the time, place, and in the manner alleged, and if so, whether the medical evidence was sufficient to establish appellant's claim.

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<sup>3</sup> Docket No. 15-1826 (issued December 16, 2015).

On April 7, 2014 OWCP requested that the employing establishment provide further information regarding appellant's exposure to asbestos at work. A May 7, 2014 OWCP telephone memoranda related that the employing establishment had archived appellant's records since he last worked in 1999. The employing establishment was attempting to retrieve appellant's records, but requested a 30-day extension to do so. It provided no further response.

By decision dated July 16, 2014, OWCP determined that appellant had established the alleged employment factors and that a medical condition had been diagnosed, but that his claim was denied because he failed to establish a causal relationship between the accepted employment factors and the diagnosed medical condition.

On July 21, 2014 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

A hearing was held on February 9, 2015 wherein appellant testified as to his employment history and exposure to asbestos from June 1978 through October 1999. By decision dated April 27, 2015, the hearing representative affirmed the July 16, 2014 OWCP decision.

On September 3, 2015 appellant filed an appeal with the Board. In a decision dated December 16, 2015, the Board affirmed OWCP's April 27, 2015 decision denying appellant's claim. The Board found that although appellant established that he was exposed to asbestos during the course of his federal employment and that he suffered from asbestosis, he failed to establish a causal relationship between his asbestosis condition and his work exposure.<sup>4</sup>

By letter dated May 26, 2016 and received by OWCP on the same date, appellant, through counsel, requested reconsideration. In support thereof, appellant submitted a May 17, 2016 medical report from Dr. Hickey, who indicated that appellant was in no overall distress with his breathing and that he had no chest pain. Dr. Hickey listed appellant's diagnostic impression as abnormal CT scan of the chest without contrast, positive asbestosis with plaque, and several new sclerotic lesions of the spine. He also listed diagnoses of chronic obstructive pulmonary disease, acute personal history of malignant neoplasm of prostate, chronic rhinitis, and chronic pneumoconiosis due to asbestos and other mineral fibers. Dr. Hickey submitted the results of a May 17, 2016 pulmonary function test. Appellant also resubmitted an October 29, 2013 report from Dr. Hickey.

By decision dated August 25, 2016, OWCP denied modification of its prior decision as the medical evidence submitted on reconsideration failed to establish that appellant's medical condition was causally related to the accepted factors of his federal employment.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged, and

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<sup>4</sup> *Id.*

that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.<sup>7</sup> To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>8</sup>

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup>

### ANALYSIS

The Board determined in a decision dated December 16, 2015 that appellant had failed to meet his burden of proof to establish a causal relationship between the accepted factors of his federal employment and his diagnosed asbestosis.<sup>10</sup>

Following the Board's decision, appellant submitted new evidence on reconsideration and OWCP conducted a merit review of his case. The issue remained whether appellant established a causal relationship between the accepted factors of employment and his diagnosed asbestosis.

The Board finds that the evidence of record does not establish causal relationship between appellant's diagnosed medical condition and the accepted factors of his federal employment.

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<sup>5</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>7</sup> *See S.P.*, 59 ECAB 184, 188 (2007).

<sup>8</sup> *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *see also P.W.*, Docket No. 10-2402 (issued August 5, 2011).

<sup>9</sup> *I.J.*, 59 ECAB 408 (2008); *supra* note 6 at 345, 352.

<sup>10</sup> *Supra* note 3.

Dr. Hickey listed appellant's diagnostic impression as abnormal CT scan of the chest without contrast, positive asbestosis with plaque, and several new sclerotic lesions of the spine. He also noted chronic obstructive pulmonary disease, acute personal history of malignant neoplasm of prostate, chronic rhinitis, and chronic pneumoconiosis due to asbestos and other mineral fibers. Dr. Hickey offered no opinion as to whether the diagnosed conditions were causally related to the accepted factors of appellant's federal employment. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of a physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>11</sup> The reports from Dr. Hickey are not sufficient to meet appellant's burden of proof as he did not offer a rationalized opinion explaining how the diagnosis of asbestosis or other pulmonary condition was causally related to the accepted employment exposure to asbestos. His reports are therefore of limited probative value.<sup>12</sup>

The Board further notes that the pulmonary function test of May 17, 2016 does not provide any diagnosis, nor does it make any statement with regard to causation. It is therefore insufficient to establish fact of injury.<sup>13</sup>

Counsel's argument that appellant's case should have been accepted because OWCP is familiar with the etiology of asbestos-related disease is an ineffectual attempt by counsel to ignore appellant's burden of proof to establish causal relationship. As found above, the medical evidence does not establish that appellant's diagnosed condition of asbestosis was causally related to the accepted employment exposure. The reports from appellant's physicians failed to provide medical rationale based on a complete factual background explaining the reason why the diagnosed condition was caused or aggravated by the accepted employment exposure.<sup>14</sup> Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under FECA.<sup>15</sup>

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment, nor his belief that the condition was caused by his employment, is sufficient to establish causal relationship.<sup>16</sup> As appellant did not establish that his medical condition was causally related to the accepted factors of his employment, he did not meet his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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<sup>11</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>12</sup> *L.S.*, Docket No. 13-1628 (November 26, 2013).

<sup>13</sup> See *G.M.*, Docket No. 14-2057 (issued May 12, 2015).

<sup>14</sup> See *F.P.*, Docket No. 15-1826 (issued December 16, 2015).

<sup>15</sup> 20 C.F.R. § 10.303; see also *R.L.*, Docket No. 15-1328 (issued September 21, 2016).

<sup>16</sup> *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that his asbestosis is causally related to factors of his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2016 is affirmed.

Issued: April 6, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board